'UN-REPORTABLE'

* **HIGH COURT OF DELHI AT NEW DELHI**

+ RFA No.577/2003

Date of decision : 24th July, 2007

SHYAM SUNDER KAKKAR ..... Appellant
! Through :Mr. Pradeep Kumar, Advocate

Versus

$ SUBHASH CHANDER KAKKAR ... Respondent
^ Through :Mr. L.S. Chaudhary, Advocate

%

CORAM:
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MS. JUSTICE ARUNA SURESH

(1) Whether reporters of local paper may be allowed to see the judgment?

(2) To be referred to the reporter or not?

(3) Whether the judgment should be reported in the Digest ?

A.K.SIKRI, J (Oral)

1. The appellant herein was defendant in the suit No. 52/2000 filed by the respondent herein for possession, damages and future mesne profits in respect of property bearing No.14-F/AB, Moti Nagar, New Delhi. It was predicated by the respondent on the premise that the aforesaid property was the self acquired property of his

father late Shri Dina Nath Kakkar which was allotted to the latter by the Land & Development Office (L&DO) and accordingly deed of conveyance was also executed by the L&DO in favour of late Shri Dina Nath Kakkar in the year 1955. It was also averred that Shri Dina Nath Kakkar migrated from Pakistan along with his family after partition of the country in the year 1947. His mother as well as appellant herein, who was the younger brother of Shri Dina Nath Kakkar, minor at that time, was maintained by him. The respondent also asserted that in these circumstances appellant lived with his father Late Shri Dina Nath Kakkar in the said house which belonged to Shri Dina Nath Kakkar. According to the respondent, appellant was, thus, only licensee in the house in question. It is also stated in the plaint that late Shri Dina Nath Kakkar had executed Will dated 18.07.1991 during his life time which was duly registered with the office of the Sub Registrar on 22.07.1991 as document No. 3336 Book No. 3 Volume No.614 bequeathing the property in question (hereinafter referred to as `the suit property') to the respondent. Shri Dina Nath Kakkar died on 11.02.2000 and on his demise, suit property had been devolved upon the respondent on the basis of the aforesaid Will and he became the exclusive owner thereof. The respondent served legal notice dated 12.08.2000 upon

the appellant terminating the licence and called upon him to hand over and deliver back part of the premises, i.e., two rooms occupied by the appellant in the suit property. As the appellant failed to vacate the premises in spite of the service of legal notice the suit in question was filed by the respondent. The appellant contested the suit by filing the written statement in which it was inter alia pleaded that the suit property was joint property of the appellant and as such respondent had no right to file such a suit claiming possession and damages etc. The submission in nut shell was that after the migration of the family on the partition of the country Shri Dina Nath Kakkar applied for the allotment of the property mentioning the names of family members which included Shri Dina Nath Kakkar himself, his wife, four children and also his mother and the appellant, younger brother of Dina Nath Kakkar.

2. Following issues were framed on the basis of pleadings between the parties:-

i. Whether the property in question is joint Hindu Family property ? OPD.
ii. Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPD.
iii. Whether the defendant is residing in the suit premises as licencee? OPD.
iv. Whether the suit is barred by limitation? OPD.
v. Whether there is no cause of action to file the present suit? OPD.
vi. Whether the plaintiff is entitled to a decree for possession of the suit property as prayed ? OPP.

vii. Whether the plaintiff is entitled to a decree for damages, if so, at what rate and for which period? OPP.
viii. If issue no.7 is proved, whether the plaintiff is entitled to any interest, if so, at what rate? OPP.
ix. Relief.

3. The learned Trial Court by means of impugned judgment and decree dated 26.03.2003 has decided these issues in favour of the respondent as a consequence whereof the suit of the respondent is decreed. The Trial Court has passed decree for possession in respect of two rooms unit with common latrine and open space as shown in red colour in the site plan annexed with the plaint. Decree for damages @ Rs.1,500/- per month from the date of filing of the suit till the delivery of the possession thereof is also passed in favour of the respondent and against the appellant and interest @ 9% per annum on these damages is also awarded. Challenging this judgment and decree, the present appeal was preferred by the defendant/appellant.

4. We may state at the outset that submission of the appellant before the Trial Court was three-fold. (1) The property in question was joint family property in which appellant was also co-owner/coparcener and, therefore suit for possession was not maintainable. (2) The appellant also challenged the validity of the Will projected by the respondent herein and submissions were that there was no

such Will executed by Shri Dina Nath Kakkar. (3) The appellant claimed ownership on the basis of adverse possession as well.

5. As pointed out above, all these questions were decided against the appellant by the Trial Court. Before us, the finding regarding adverse possession was not pressed. Some arguments were advanced on genuineness of the Will alleging that two Wills were projected though both were of the same day and identically worded but there were certain discrepancies. One was the original Will produced by the respondent and other was the certified copy of the registered Will obtained from the office of the Sub Registrar. The infirmities/contradictions which were pointed out relates to the attesting witnesses, i.e., in the original Will there were three attesting witnesses whereas in the certified copy produced, there were two attesting witnesses were shown. Second purported contradiction relates to the testimony of Shri L.M. Kapoor, who is one of the three attesting witnesses, in the original Will, but had not appeared before the Sub Registrar at the time of registration of the Will. On this basis it was tried to argue that he could not have appeared in the witness box as PW-1 to depose about the execution of the said Will. However, when we queried learned counsel for the appellant as to what would turn on the issue regarding Will

inasmuch as the appellant was not class I heir of Shri Dina Nath Kakkar and factum of Will was executed by the siblings of respondent namely his other brother and two sisters on the basis of which the property also were mutated in the name of the respondent herein, learned counsel for the appellant was candied in conceding that keeping in view the nature of dispute in the instant case the issue regarding Will would be irrelevant and, therefore, he gave up this plea also. In these circumstances, the only question that remains to be considered and decided in this appeal is as to whether property in question is a joint family property and whether appellant has any right, title or interest in the same.

6. It is not in doubt that the conveyance deed regarding the said property was executed by the L&DO is in the name of late Shri Dina Nath Kakkar. Therefore, as per the title deeds owner of the property is Shri Dina Nath Kakkar. However, submission of the learned counsel for the appellant was that the property in question was purchased from the joint funds and also that the allotment was made specifically keeping in mind that appellant was also member of the family and, therefore, property should be teated as joint family property. In support of this submission learned counsel relied upon the following documents:- (1) He referred to application dated 23.05.1995 preferred by Shri Dina Nath

Kakkar with the rehabilitation Minister in Delhi State Government wherein request was made for allotment of two rooms quarter. In this application he mentioned the names of the family members including his mother and brother, namely, the appellant and requested for two rooms accommodation to accommodate large family. Learned counsel also pointed out that in this application he also referred to the verified claim of Rs.9345/- which Shri Dina Nath Kakkar wanted to be adjusted against the consideration payable for the accommodation to be allotted. His submission was that without the inclusion of his mother and the appellant as family members, Shri Dina Nath Kakkar could not have been alloted two rooms accommodation and would have got only one room accommodation. Therefore, when two room accommodation was alloted it was to take care of other persons including appellant and appellant in these circumstances has became entitled to stay in one of those two rooms. He also submitted that mentioning of verified claim of Rs.9345/- in this application would signify that consideration there against was paid from the aforesaid claims which were the claims given to the family in lieu of properties left behind in West Pakistan. And, therefore, the property should be treated as joint family property. (2) Second document which was referred is letter dated

29.05.1955 addressed by Shri Dina Nath Kakkar to the Housing & Rent Officer Delhi. In this, Shri Dina Nath Kakkar reiterated that he was to financially support his mother and younger brother and, therefore, he should be allotted two rooms accommodation. The learned counsel specifically referred to the endorsement made on this application by the officer while recommending allotment of two rooms quarter, wherein the endorsement was to be affected, that applicants (i.e., Dina Nath Kakkar's family members) be considered with him and be alloted double room accommodation.

7. Before dealing with these arguments it would be apposite to take note of the discussion contained in the impugned judgment referred by the learned Additional District Judge on this issue. The learned Additional District Judge has returned the finding to the fact that there is no corroborating evidence on behalf of the appellant herein to prove that property in dispute is joint Hindu family property. He referred to the deposition of the appellant himself wherein appellant had admitted that no papers or documents are with him to prove that Shri Dina Nath Kakkar was the karta of the HUF, actually on the ground that he was elder brother, the appellant had stated that he was karta of the family. The learned Judge disbelieved the contention that there was a joint family property.

8. As already pointed out above, conveyance deed in respect of the property is only in the name of Shri Dina Nath Kakkar, the appellant could not produce any evidence to show that consideration thereof was given after realising the claims from some joint family properties left behind in Pakistan. No doubt in the letter dated 23.05.1959 there is reference to verify claim of Rs.9345/-. However, it was necessary for the appellant to supply the missing link, namely, that this claim was the result of properties which were joint family properties and not the self acquired properties of Shri Dina Nath Kakkar in Pakistan against which this claim was given. No such evidence is produced by the appellant. That apart, we find from letter dated 26.06.1961 (Exhibit DW4/P-2) that certain claims were purchased by Shri Dina Nath Kakkar from third parties. It is a matter of common knowledge that the claims which were sanctioned by the Government of India to displace persons from Pakistan against their properties left there, those claims were transferable. Therefore, merely because Shri Dina Nath referred to verify claim of Rs.9345/- would not mean that these claims related to joint family properties of the parties in Pakistan.

9. It would be of interest to note that the appellant had summoned official from the office of L&DO as DW-4 to

prove the record relating to the allotment of suit property. The documents which he produced have rather proved the case of the respondent and deposition of this witness has gone against the appellant. The documents produced by him namely Exhibits DW4/1, DW4/PW and DW4/P2 have proved that it is late Shri Dina Nath Kakkar who made payment in respect of the property in question. When it has been established on record that the sale consideration in respect of the suit property was given by Shri Dina Nath Kakkar and at the same time, it could not be proved by the appellant that this sale consideration was realized from any of the properties belonging to the family or that there was any joint family properties at all. The conclusion recorded by the learned Trial Court to the fact that Shri Dina Nath Kakkar was the owner of the property in question and property was not joint Hindu family property is correct conclusion in fact, as well as in law. No doubt in order to accommodate his large family, in question, Shri Dina Nath Kakkar wanted two rooms' accommodation. However, merely because of this reason if Shri Dina Nath Kakkar was able to get allotment of two rooms accommodation but the consideration thereof was paid by him exclusively from his own funds, property in question would not become joint family property. Equally in such an allotment the appellant could not claim any right,

title or interest. The fact remains that Shri Dina Nath Kakkar allowed the appellant to stay in the suit property all these years being his younger brother. The ownership of this property now vests in the respondent and there is no legal obligation on the part of the respondent to continue to allow the appellant to remain in this property. We, therefore, do not find any merit in this appeal which is, accordingly, dismissed.

10. Trial Court record be sent back.

A.K. SIKRI, J.

ARUNA SURESH, J.

July 24, 2007
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